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Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

No. 93-1171

ROBIN R. MOERMAN,

Petitioner,

v.

STATE OF CALIFORNIA, Director of the Department of Fish and Game of the State of California; and DOES I through IX, inclusive,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal, State of California, First Appellate District, Division One

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does damage caused by wild animals relocated by the State constitute a physical taking by the State when the State neither owns nor controls the wild animals?

TABLE OF CONTENTS

	Page
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE DENIED	5
I. NEITHER THE DECISION BELOW NOR THE RECORD RAISE THE QUESTION PRESENTED IN THE PETITION	5
II. THIS COURT LACKS JURISDICTION BECAUSE THE PETITIONER FAILED TO RAISE A FEDERAL CONSTITUTIONAL ISSUE AND THE STATE APPELLATE COURT DID NOT DECIDE ANY FEDERAL ISSUE	8
III. THIS CASE DOES NOT PRESENT AN IMPORTANT ISSUE THAT REQUIRES THIS COURT'S EXPENDITURE OF SCARCE JUDICIAL RESOURCES	9
CONCLUSION	11

TABLE OF AUTHORITIES

	Page
Cases	
Barrett v. State 220 N.Y. 423 116 N.E. 99 (N.Y.Ct.App. 1917)	9
Christy v. Hodel 857 F.2d 1324 (9th Cir. 1988) *cert. denied* 490 U.S. 1114 (1989)	8, 9, 10
Kaiser Aetna v. United States 444 U.S. 164 (1979)	10, 11
Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982)	10, 11
People v. Brady 234 Cal.App.3d 954 186 Cal.Rptr. 19 (1991)	10
Yee v. City of Escondido. Cal 503 U.S. ___ 112 S.Ct. 1522 (1992)	4, 7
Federal Statutes	
28 U.S.C. § 1257(a)	2
Public Law	
Pub. L. No. 94-389 § 4 90 Stat. 1190 (1976)	6

TABLE OF AUTHORITIES CONT'D

	Page
California Constitution	
Article I, § 19	3
California Statutes	
California Fish & Game Code	
§ 332	6
§ 3951	2, 6
California Regulations	
14 California Code of Regulations	
§ 364.5	6
§ 670.5	10

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The respondents State of California and the Director of the Department of Fish and Game of the State of California, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the State of California Court of Appeal for the First District, Division One in this case. That opinion is reported at 17 Cal. App. 4th 452 (1993).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

In 1971, the California Legislature enacted legislation designed to protect and conserve California's native tule elk population. It directed the California Department of Fish and Game ("the Department") to restore the once abundant population by relocating tule elk to suitable habitats. Cal. Fish & G. Code § 3951. Pursuant to the Legislature's mandate, one area to which the Department relocated tule elk is an area near Lake Pillsbury within the Mendocino National Forest in Lake County, California, in 1978-1980. AA[1] at 152-153 ¶¶ 4 - 6.

In November, 1988, some eight years after the relocation had occurred, petitioner Robin R. Moerman ("Moerman" or "Petitioner") filed a complaint in state superior court against the Department claiming the Department was liable for the presence of the tule elk on his property. AA at 001-003. An amended complaint was filed in May, 1991. AA at 107-110. No federal constitutional provisions were cited in either of Moerman's complaints, contrary to Moerman's statements in his petition. Pet. at 8.

The State moved for summary judgment. RA 001-005. The State presented evidence on the material facts that the tule elk on Moerman's ranch were wild animals that were neither owned nor controlled by the

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1. References to the Appellant's Appendix filed in the Court of Appeal are designated "AA" followed by the page numbers. References to the Respondent's Appendix filed in the Court of Appeal are designated "RA".

Department. Id. at 007. The State argued that, as a matter of law, the State was not liable for takings based upon the activity of wild animals which it neither owns nor controls. AA 132-137, 296-299, 308-310.

In his opposition to the motion for summary judgment, Moerman never argued or presented evidence of many of the assertions made in his Petition to this Court. For example, Moerman never argued or presented evidence to support his broad assertions that he had exhausted all reasonable alternatives to exclude the tule elk from his ranch or that the State had deprived him of all reasonable and economic means to exclude the tule elk from his ranch. AA 280-282. Moerman never argued or presented evidence that the State intended the tule elk to move onto his property. Ibid.

Moerman also never argued violation of any federal constitutional rights. In his brief to the Trial Court, he expressly stated that the "California Constitution Article I, Section 19 protected him against taking without due process." AA 229, 231, 233.

The only evidence presented by Moerman went solely to the issue whether the State "controlled" the tule elk. Id. at 281-282. This evidence simply showed that the State captured, moved and released tule elk, and that the movement of no more than one quarter of the tule elk was monitored by means of radio telemetry collars. Ibid.

The trial court granted the State's motion for summary judgment, finding that there was no dispute that the tule elk were wild animals and that the Department has exercised no control over them since their release over ten years (now twelve years) ago. Pet. Appendix A at 2. Judgment was entered dismissing the case. AA at 320. Moerman appealed.

The Court of Appeal unanimously affirmed the judgment of the Trial Court. 17 Cal. App. 4th 452 reprinted at Petition Appendix B. The Court found that there had been no physical taking of Moerman's property because the tule elk are not instrumentalities of the State and they are not controlled by the State. Pet. Appendix B at 6.

The Court of Appeal's decision was based on the undisputed fact that "tule elk are wild animals who roam across private and public property" and on the long-standing legal principle that "The state does not own wild animals [citation omitted] nor does it control wild animals that have not been reduced to possession [citation omitted]." Id. at 11.

The Court of Appeal declined to consider Moerman's regulatory taking argument because he did not advance it in the trial court. Id. at 16. The Court held that the trial court was never asked to perform the complex factual assessment and balancing of interests required to determine whether a regulatory taking has occurred. Ibid.

Moerman belatedly attempted to raise a federal claim in the Court of Appeal. The Court of Appeal, however, did not decide any federal claims. In fact, in distinguishing Moerman's claim from that of the petitioner in Yee v. City of Escondido, Cal., 503 U.S. ___, 112 S.Ct. 1522 (1992), the Court stated "[Moerman] arguably did not present a proper federal claim below." Appendix B at 17.

The Court of Appeal denied Moerman's petition for rehearing. Pet. Appendix C. The California Supreme Court denied Moerman's petition for review. Pet. Appendix D.

REASONS WHY THE PETITION SHOULD BE DENIED

The issue decided by the Court of Appeal was whether the State is liable for damage to property caused by wild animals. The trial court and the Court of Appeal correctly ruled that according to long-standing principles of law, the occasional presence of wild tule elk on Moerman's ranch does not constitute a physical taking of Moerman's property by the State. The tule elk are wild animals and are neither owned nor controlled by the State. The State's relocation of these animals to their native range did not change their nature or their legal status as wild animals.

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION.

The instant petition is based on a misstatement of the facts, the record and the applicable law. In effect, it describes a case utterly different from what was presented and decided below. Petitioner has phrased the Question Presented for Review in the petition as whether a private property owner suffering damages caused by wild animals must prove that the government owns or controls the animals "when the government relocates statutorily protected animals to a new area with the intent that they feed upon surrounding private lands." Pet. at i. This was not, however, the issue that the state court decided. Moreover, although the issue is phrased in a manner calculated to pique this Court's interest, the record below will not allow the Court to address that issue.

Petitioner's misstatement of the issue contains numerous factual predicates that are not borne out by the record and were not part of the decisions below. For example, Petitioner attempts to phrase the issue so as to bring himself within cases in which it is argued that statutory protection of wild animals deprives the landowner of the use of his property and amounts to an

inverse condemnation.[2] This misstatement is repeated in Moerman's statement of statutory and regulatory provisions at issue. Pet. at 2-3. Moerman's inverse condemnation cause of action was based solely upon the Department's action in relocating tule elk. He never contended that California law protecting tule elk interfered with his use of or ability to protect his property.

Moerman's reference to the tule elk having been relocated to a "new area" also misrepresents the record below. Although tule elk had disappeared from Mendocino County by 1870, the undisputed evidence was that Moerman's ranch fell within the elk's native range. Appendix B at 6. Thus, neither the area to which they were relocated nor Moerman's ranch were "new areas" for California's tule elk population.

Moerman's provocative reference to "the state's intent that tule elk feed on surrounding private lands" misrepresents the issue decided by the Court of Appeal and the factual record below. Moerman neither presented evidence of the State's alleged intent nor requested the trial court or Court of Appeal to rule upon this complex factual issue.[3] His opposition to the State's motion for

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2. California Fish and Game Code section 332 authorizes the California Fish and Game Commission to regulate the hunting of tule elk. Pet. Appendix E. California Fish and Game Code section 3951 establishes the tule elk management program. Appendix F. California Code of Regulations, title 14, section 364.5 sets forth provisions adopted by the California Fish and Game Commission for the taking of tule elk. The provisions are adopted annually, with modifications. Moerman's Appendix G does not indicate to what year it applies.

3. The evidence cited by Moerman in his petition regarding the state's "intent" (see Pet. at 5) is not necessarily probative of the state's intent in 1978-1980. The Management Plan for the Conservation of Tule Elk ("MPCTE") was prepared by an interagency task force comprised of state and federal agencies, pursuant to federal statute. Pub. L. No. 94-389 § 4, 90 Stat. 1190

summary judgment was based solely upon the issue of control: whether the State controlled the tule elk after it released them such that it was responsible for the damage caused to Moerman's ranch.

In addition, Moerman incorrectly asserts in his petition that this case presents a regulatory takings claim. Pet. at 11, n. 5. As the Court of Appeal correctly decided, Moerman failed to raise the regulatory taking claim in the trial court and the doctrine against raising new factually complex issues for the first time on appeal precluded the Court from deciding the issue. This Court's decision in Yee v. City of Escondido, 503 U.S. ____, 112 S.Ct. 1522, 1532-1534, does not require otherwise.

In Yee, the absence of a factual record was not prejudicial to the parties because the case involved a facial challenge to the City's mobile home rent control ordinance. Here, however, Moerman is challenging the state's action as applied to his property. As this Court has stated, a regulatory taking challenge involves a complex factual assessment and balancing of interests. Yee, 112 S.Ct. at 1526. Moerman, however, presented no evidence whatsoever regarding this assessment and balancing of interests; he never asked the trial court to perform this analysis and the State was never obliged to present evidence on or refute a regulatory taking theory. See Appendix B at 16.

(1976). The version cited by Moerman was prepared in 1985. AA at 201-227. The Mendocino County Tule Elk Management Plan was prepared by the Department in 1988. AA 159-187.

II. THIS COURT LACKS JURISDICTION BECAUSE THE PETITIONER FAILED TO RAISE A FEDERAL CONSTITUTIONAL ISSUE AND THE STATE APPELLATE COURT DID NOT DECIDE ANY FEDERAL CONSTITUTIONAL ISSUE.

Despite Moerman's protestations to the contrary, the federal issue which Moerman purports to raise in this petition--that the Department's actions violate his rights under the Fifth and Fourteenth Amendments to the Untied States Constitution--was neither raised by Moerman nor decided by the Court of Appeal. Appendix B at 15, 17. Neither Moerman's original complaint, nor his amended complaint cite any federal constitutional provisions. Moerman's trial brief refers expressly and exclusively to the California Constitution. AA 228, 231, 233. Although Moerman's trial brief refers to a federal case, Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988) cert denied 490 U.S. 1114 (1989), that case decided a regulatory takings question which is not at issue in this case, and refers to a blend of state and federal cases interpreting state and federal constitutions. See 857 F.2d at 1334-1335.

Moerman attempted to raise a federal claim in his appellate briefs. The state responded that no federal claim had been stated. Respondents Brief at 7.[4] The Court of Appeal itself expressed doubt that a federal claim had been presented. "... in fact, [Moerman] only tangentially asserted a taking under the federal

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4. "Similarly, the arguments in the trial court considered whether there was a physical taking of plaintiff's property in violation of the State Constitution. (See, e.g., appendix pp. 229, 231 (sic) 233.) The Opening Brief focusses instead on takings law under the federal constitution. While the takings provision of both constitutions are substantially similar (citation omitted), the claims at issue here do not raise federal questions." Respondents' Brief at 7.

Constitution" (Appendix B at 15) and "[Moerman] arguably did not present a proper federal claim below" (Appendix B at 17). The Court of Appeal did not decide the federal constitutional issue. Because the Court of Appeal doubted that Moerman had raised a federal claim, one can imply that the Court of Appeal rested its decision upon the state constitution not the federal constitution.

III. THIS CASE DOES NOT PRESENT AN IMPORTANT ISSUE THAT REQUIRES THIS COURT'S EXPENDITURE OF SCARCE JUDICIAL RESOURCES.

Based upon the undisputed fact that the tule elk on Moerman's ranch are wild animals that roam at will across private and public property, the Court of Appeal reached the common sense conclusion that their presence on Moerman's ranch is not a physical occupation of his property by the State or authorized by the State. The Court of Appeal's decision is consistent with the long line of cases holding that the State is not liable for damages caused by wild animals. See Christy v. Hodel, 857 F.2d at 1334-1335, and the cases cited therein. The earliest cases were decided toward the beginning of the century. See, e.g., Barrett v. State, 220 N.Y. 423, 116 N.E. 99, 101-102 (N.Y.Ct.App. 1917) [state not responsible for damages to private property caused by relocated beavers].

In a strained attempt to make this case attractive for certiorari, Moerman incorrectly contends that his case presents an issue left unresolved in a footnote by the Ninth Circuit in Christy. The Ninth Circuit indicated in that footnote that there were issues which it did not decide.[5/] The Court did not decide this issue because it

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5. At footnote 9, the Court stated "Whether the government may be held responsible for damage caused by bears or other wild animals that have been relocated by the government, under a theory that such animals are instrumentalities of the government, is a question we do not decide." 857 F.2d at 1335.

was not presented in the case. On the contrary, the Christy opinion supports the Court of Appeal's decision. Pet. Appendix B at 11. Further, Christy presented a regulatory taking challenge; Moerman in this case raised and the state appellate court decided only a physical taking challenge.

Moerman makes a futile attempt to analogize the issue presented by his case to the issue described by Justice White in his dissent to this Court's denial of Christy's petition for writ of certiorari. Justice White indicated interest in an issue regarding the government's prohibition against Christy's shooting grizzly bears, an endangered species. As stated above, however, this case does not involve any governmental prohibition against Moerman shooting tule elk or otherwise excluding them from his property. Moerman's case simply involves the government's relocation of tule elk and no other governmental activity. Moreover, the tule elk are not listed as an endangered or threatened species. See 14 Cal. Code Regs. § 670.5. Moerman never claimed, he never presented evidence, and the state courts never decided any issue involving any governmental prohibition or other regulation of Moerman's use of his property.

Finally, Moerman attempts to shoehorn his case into the physical taking holdings of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) and Kaiser Aetna v. United States, 444 U.S. 164 (1979). The Court of Appeal correctly rejected Moerman's effort. In Loretto, this Court held that a physical taking had occurred when a local ordinance required a landlord to permit the installation of cable television equipment on his property. 458 U.S. at 438-439. The Court of Appeal correctly noted the distinction between tule elk and cable television equipment or personnel. Appendix B at 11. Unlike equipment or personnel,the tule elk are wild animals over whom the

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a question we do not decide." 857 F.2d at 1335.

State has no control or possessory interest. See People v. Brady, 234 Cal.App.3d 954, 958-959, 186 Cal.Rptr. 19 (1991). While the elk may have, on occasion, been physically present on parts of Moerman's ranch, because they are not agents or instrumentalities of the State, the State has not occupied his ranch.

Loretto is also distinguishable because Moerman is not required to suffer the presence of tule elk whereas the landlord in Loretto was required to suffer the presence of cable equipment and personnel. In recognition of this critical distinction, Moerman blithely and belatedly contends that he has exhausted all alternatives to exclude tule elk from his property. Pet. at 7. As discussed above, however, this issue was never advanced to the trial court and was not decided by the Court of Appeal.[6/]

Moerman's case is also distinguishable from Kaiser Aetna, 444 U.S. 164, 176. Unlike the situation in Kaiser, the State has not given the tule elk a "right" to cross Moerman's property; it merely released them at a place in a national forest from which they eventually wandered onto Moerman's ranch.

CONCLUSION

Moerman's petition fails to present the circumstance "[w]hen a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court." The Question Presented by Moerman was not presented to or ruled upon by the state court. Nor does the record allow this Court to decide the Question Presented. Rather, the issue that the

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6. The Court of Appeal noted in passing that "while as a practical matter it may be difficult for Moerman to exclude the tule elk from his property without harming them, the state is not requiring him to submit to the occupation." Appendix B at 13.

State Court did decide is based upon long-standing principles of law that the presence of wild animals on Moerman's ranch does not constitute a physical taking of his property by the State.

For these reasons, Moerman's petition for certiorari should be denied.

Respectfully submitted,

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